IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; and ANIMAL LEGAL DEFENSE FUND,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America; PATRICK M. SHANAHAN, in his official capacity as Acting Secretary of Defense; LIEUTENANT GENERAL TODD T. SEMONITE, in his official capacity as Commander and Chief of Engineers, U.S. Army Corps of Engineers; KEVIN McALEENAN, in his official capacity as Acting Homeland Security Secretary; DAVID BERNHARDT, in his official capacity as Secretary of the Interior,

Defendants.

Case No.: 1:19-cv-00408 (TNM)

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

EXECUTIVE AND ADMINISTRATIVE MATERIALS

COURT RULES

ARGUMENT

The Department of Defense ("DoD") Secretary's September 3, 2019 decision to fund eleven border wall projects through transfer of $3.6 billion in appropriated emergency military construction funds (hereafter, "MILCON") reaffirms the bases for denying Defendants' Motion to Dismiss for the following supplemental reasons.

I. Plaintiffs Have Article III Standing to Challenge Department of Defense Implementing Actions Transferring Emergency Military Construction Funds to Border Wall Construction

Plaintiffs' opposition brief, ECF No. 31, demonstrated Article III standing in relation to all claims and included submission of twelve member declarations. These declarations included injury-in-fact allegations for two "border wall projects" previously identified in Customs and Border Protection's ("CBP") February 25, 2019 Request for Assistance Pursuant to 10 U.S.C. § 284, but not funded until the Secretary's September 3, 2019 MILCON decision—Yuma 3 (Bird, McKinnon, and Walsh Declarations) and El Paso 2 (Hadley, Robinson, Schlyer, and Walsh Declarations). In addition, Plaintiffs' standing declarations addressed four border wall projects that did receive § 284 funds, and overlap with areas now also impacted by four MILCON projects—El Centro 5 and El Centro 9 (in same vicinity as El Centro 1) (Anderson Declaration), El Paso 8 (in same vicinity as El Paso 2) (Hadley, Robinson, Schlyer, and Walsh Declarations), and Yuma 6 (in same vicinity as Yuma 1) (Russell Declaration). In addition, Plaintiffs provide a new declaration for the newly identified San Diego 4 project (Holslin).[1]

[1] Plaintiffs' First Amended Complaint ("FAC"), ECF No. 16, alleges injury-in-fact for the areas impacted by remaining MILCON border wall projects not yet specifically addressed by Plaintiffs' standing declarations, including San Diego 11 (¶¶ 133-134), Yuma 2 and 10/27 (¶¶ 137-139), and Laredo 7 (¶¶ 143-146). Plaintiffs will produce detailed member standing declarations specific to these projects on summary judgment. *See Defs. of Wildlife v. Lujan*, 504 U.S. 555, 561 (1992) (when deciding a motion to dismiss, courts "presume that general allegations embrace those specific facts that are necessary to support the claim.").

II. The Long Delay Between the Issuance of Proclamation 9844 and Department of Defense Implementing Actions Affirms the Validity of Plaintiffs' Claim that the President Abused His Authorities Under the National Emergencies Act

Plaintiffs' opposition brief demonstrated that its NEA claim is justiciable, as it turns upon ordinary principles of statutory interpretation, including addressing the meaning of the term "emergency." Understanding the meaning of "emergency" begins with its plain language definition as an "unforeseen combination of circumstances or the resulting state that calls for immediate action." *Emergency*, MERRIAM-WEBSTER DICTIONARY. The declaration and implementation of the February 15, 2019 "Proclamation Declaring a National Emergency Concerning the Southern Border of the United States" (hereafter, "Proclamation 9844") meets neither of these criteria.

First, the President significantly delayed the time between his initial identification of an emergency situation and the issuance of Proclamation 9844. The President's own words demonstrate that he initially used the threat of an emergency declaration as a tool to cajole Congress into meeting his funding demands; and when that approach failed, he used the NEA authorities as a pretext for transferring billions of dollars in appropriated DoD funds in order to achieve his border wall funding goals. FAC ¶¶ 92-108; *see Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) ("[T]he Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process."). By the time the President issued Proclamation 9844, the long delay precluded any possible characterization of the declared emergency as involving an "unforeseen combination of circumstances."

Similarly, Defendants' actions after the Proclamation bear no relation to the dictionary definition of emergency of "immediate action" taken in response. Nearly seven months elapsed between Proclamation 9844 and the Secretary's September 3, 2019 decision approving the transfer of $3.6 billion in MILCON funds pursuant to 10 U.S.C. § 2808. During the intervening time, Defendants instead prioritized the spending of $2.5 billion in DoD funds passed through the 284 counterdrug account, highlighting the abuse of the NEA's authorities as a pretext for achieving the President's appropriations goals. *See Dep't of Commerce*, 139 S. Ct. at 2575-76 ("Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision … Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.").

III. Department of Defense Implementing Actions Are Not Committed to Agency Discretion By Law

Defendants argue that "a final decision by the Secretary of Defense to undertake military construction pursuant to § 2808 is not reviewable because it is 'committed to agency discretion by law.'" Supp. Br. at 4 (*quoting* 5 U.S.C. § 701(a)(2)). The Supreme Court, however, has recently reaffirmed that it "read[s] the § 701(a)(2) exception … quite narrowly, restricting it those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *DOC*, 139 S. Ct. at 2569 (internal quotations and citations omitted). It has also "generally limited the exception to certain categories of administrative decision that courts traditionally have regarded as committed to agency discretion." *Id*. This narrow reading is consistent with the "basic presumption of judicial review" in APA cases. *Abbott Labs v. Gardner*, 387 U.S. 136, 140 (1967).

The Defense Secretary's decision transferring $3.6 billion in MILCON funds to eleven border wall construction projects in order to implement Proclamation 9844 is by its own terms made "pursuant to the authority granted to [him] in Section 2808." Def. Supp. Br. Ex. 1. Section 2808 provides both "law to apply" and "meaningful standards" by which to measure the legality of the Proclamation 9844 and the Secretary's decision. Thus, "[b]ecause this is not a case in which there is 'no law to apply,' the Secretary's decision is subject to judicial review." *DOC v. New York*, 139 S. Ct. at 2569 (*quoting Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

Here, the plain language of § 2808 "constrains the Secretary's authority . . . in a number of ways." *DOC v. New York*, 139 S. Ct. at 2568. *See* FAC ¶¶ 155-166. As detailed further in Section IV, *infra*, the large majority of the eleven MILCON projects are planned for lands that are privately owned or are on Federal public lands. These lands are not a "military installation" and thus do not qualify as "military construction," as defined by the MILCON statutory provisions. 10 U.S.C. § 2801(a). While Defendants dispute Plaintiffs' interpretation, the language of § 2808 constrains the Secretary's discretion with a specificity more than sufficient to allow for statutory interpretation and judicial review.

The Secretary's decision also does not fall within the "categories of administrative decision that courts traditionally have regarded as committed to agency discretion." Like other legislative enactments, discretionary expenditure statutes and appropriations acts are reviewable where they "afford[] a statutory reference point by which the court is able to review the Secretary's determination." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 752 (D.C. Cir. 2002) (internal citations and quotations omitted); *id*. at 754 (rejecting arguments that the Agriculture Secretary's decisions were unreviewable under § 701(a)(2) where her actions were "inconsistent with the plain language of the 2000 Appropriations Act.").

While "certain allocations of funds from lump-sum appropriations may be committed to agency discretion, this narrow exception does not 'typically' or 'presumptively' extend to all allocations of appropriated funds." *Planned Parenthood of N.Y. City, Inc. v. United States*, 337 F. Supp. 3d 308, 325 (S.D.N.Y. 2018) (*quoting Lincoln v. Vigil*, 508 U.S. 182, 190 (1993)). Accordingly, "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statute." *Lincoln*, 508 U.S. at 193. Here, 10 U.S.C. § 2808 (as well as provisions of the 2019 Consolidated Appropriations Act ("CAA")) specifically circumscribes DoD's use of MILCON funds to construction projects undertaken with respect to a military installation, and thus this case does not fall within the "lump sum" exception to reviewability.

Nor does the involvement of the military render this case unreviewable. This is not a case involving internal military personnel matters or concerns about confidential state secrets, but the legality of transferring DoD funds to construct a border wall, much of it on protected Federal public lands, and much of the remainder of which will require the taking of private property. *Cf North Dakota v. United States*, 495 U.S. 423, 443 (1990); *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). DoD agency action to transfer MILCON funds to border wall construction will result in injury-in-fact to Plaintiffs' members' (and many others') interests. The government cannot shield its actions as unreviewable under the banner of military or national security considerations in these circumstances. *Laird v. Tatum*, 408 U.S. 1, 16 (1972) ("[T]here is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) ("[I]t does not infringe on the core role of the military for the courts to exercise their own time

honored and constitutionally mandated roles of reviewing and resolving claims like those presented here."); *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").

IV. Plaintiffs' Claims Challenging the Transfer of MILCON Funds as a Violation of 10 U.S.C. § 2808 and the 2019 Consolidated Appropriations Act Are More Than Adequately Pled

Plaintiffs' second and third claims plead in detail allegations explaining how Proclamation 9844 and DoD implementing actions unlawfully transfer funds appropriated to military construction in violation of § 2808 and the CAA. FAC ¶¶ 155-170. The fact that the final DoD implementing action was not taken until more than seven months after the President's proclamation does not render these allegations "conclusory assertions." *See AFSCME Local 2401 v. District of Columbia*, 796 F. Supp. 2d 136, 141 (D.D.C. 2011) ("[P]laintiffs' complaint provides as much or more detail and factual heft as have others than have been held to state a claim . . . under *Twombly* and *Iqbal* . . . ."). Defendants also incorrectly state that these claims are "unsupported by factual allegations," when the FAC includes extensive factual background in relation to all of the claims. *See* FAC, ¶¶ 83-146; *AFSCME Local 2401*, 796 F. Supp. 2d at 140 ("Read *in toto* … plaintiffs' amended complaint states a plausible claim …"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n. 14 (2007) (at pleading stage, concern is not with particularity of the factual allegation, but whether the complaint "*in toto* . . . render[ed] plaintiffs' entitlement to relief plausible.")[2]

[2] Like Plaintiffs' claims alleging the unlawful transfer of appropriated funds into, and from the 284 counterdrug account, Plaintiffs' MILCON claims allege that the transfers also violate provisions of the 2019 CAA (§ 230(a) (by exceeding and falling outside of the Act's monetary and geographic restrictions, respectively) and § 739 (violating prohibition on use of any appropriated funds to increase funding for a program, project, or activity).

V. Defendants Have Unlawfully Transferred MILCON Funds to Border Wall Projects Not Carried Out With Respect to a Military Installation

Defendants again repeat their incorrect assertion that "the statutory provisions cited by Plaintiffs [in the FAC] are entirely unrelated to the Secretary of Defense's ability to exercise his § 2808 authority." MTD Supp. at 5. To the contrary, the meaning of the term "military construction" is central to the legality of the Secretary's actions. Even assuming the President validly declared a national emergency that requires use of the armed forces pursuant to the NEA (he did not), the Defense Secretary's implementing actions are still constrained by the statutory meaning of "military construction," defined as "any construction, development, conversion, or extension of any kind *carried out with respect to a military installation*." *Id*. § 2801(a) (emphasis added); *see* U.S.C. § 2808(a) (in event of national emergency, Defense Secretary "may undertake military construction projects."). "Military installation" is in turn defined to "mean[] a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id*. § 2801(c)(4).

Defendants concede that only two of the MILCON border wall projects are located on an existing military installation, Yuma 2 and Yuma 10/27, located on Barry M. Goldwater Range. Goddard Decl. ¶ 10a, ECF No. 37, Ex. 3. Two additional projects—Yuma 3 and San Diego 4—are located exclusively on federal public domain land. *Id*. ¶ 10b. Five projects are located on a combination of federal and private lands, and the remaining two projects are located entirely on private lands. *Id*. ¶ 10b-10c.

On September 24, 2019, Public Lands Orders issued by the Secretary of the Interior transferred public domain lands under his stewardship to the Department of the Army for five of the eleven projects, including the totality of San Diego 4 and Yuma 3, and portions of Yuma 6, El Paso 2, and El Paso 8, were published in the Federal Register. *See* Public Lands Order No.

7883 (San Diego 4), 85 Fed. Reg. 50063; No. 7884, 85 Fed. Reg. 50063 (El Paso 8); No. 7885, 85 Fed. Reg. 50064 (El Paso 2); No. 7886, 85 Fed. Reg. 50065 (Yuma 6); No. 7887, 85 Fed. Reg. 50064 (Yuma 3).

Defendants cannot manufacture the presence of a "military installation" through after-the-fact piecemeal acquisition of Federal and private lands within the eleven MILCON border wall project areas subsequent to the President's February 22, 2019 Proclamation. Although the definition of "military construction" also includes "any acquisition of land or construction of a defense access road [23 U.S.C. § 210]," this phrase is best interpreted as specific to acquisition related to ensuring access to *existing* military installations. *See* 23 U.S.C. § 210(a)(1) ("The Secretary is authorized . . .to provide for the construction and maintenance of defense access road . . . *to military reservations*") (emphasis added); *id* § 210(e)("[T]he Secretary is authorized to acquire, enter upon, take possession thereof, and expend funds for projects thereon.").

Defendants' argument would instead allow emergency MILCON funds and other acquisition mechanisms to *create* new "military installations" where none currently exist. Under this circular interpretation, emergency funds which are limited to military installations under § 2808 can be used to create a new military installation, thus justifying the legality of the emergency proclamation. Indeed, Defendants intend to use MILCON funds not only for the purported "military construction" of the border wall, but on project-related administrative costs, costs associated with initial real estate activities (including title evidence) necessary to acquire jurisdiction over non-DoD land; and eminent domain payment claims. Goddard Decl. ¶¶ 7-9.

Even assuming that the parcels within planned border wall projects recently acquired by DoD can be considered a "military installation," the designation of such installations would cover only select, isolated, and piecemeal portions of the eleven MILCON projects. DoD, for example, currently has *no* ownership interest in or jurisdiction over any portion of El Centro 5

and Laredo 7, which are entirely privately owned and "will require either purchase or condemnation." Goddard Decl. ¶ 10c. There is also no evidence DoD has acquired ownership or jurisdiction over any portion of San Diego 11 or El Centro 9. *Id*. ¶ 10b. Finally, pursuant to the Interior Secretary's Public Land Orders DoD has acquired jurisdiction over only piecemeal portions of Yuma 6, El Paso 2, and El Paso 8, which like San Diego 11 and El Centro 9, "involve various combinations of Federal domain land; Federal non-public domain land . . . and non-Federal land." *Id*. Defendants' processes to acquire the Federal lands and take the private lands by eminent domain "will require additional time and are not expected to conclude before April 2020."

Despite this piecemeal and isolated transfer of lands to DoD jurisdiction in relation to the eleven MILCON projects, under the Defense Secretary's September 3 decision, *$3.6 billion in MILCON funds have already been transferred*. *See* Goddard Decl. ¶ 12 ("[T]he Corps will begin immediately incurring project-related administrative costs . . ."). This transfer is plainly counter to § 2808(a), which only authorizes the Defense Secretary to transfer MILCON funds for "military construction" that is being carried out with respect to a military installation.

VI. Defendants' IIRIRA Waivers of Laws in Relation to '284 Counterdrug' Border Wall Projects Do Not Render Plaintiffs' NEPA Claim Unjusticiable

In the briefing on Defendants' motion to dismiss, the parties disputed whether the Court lacks jurisdiction to hear Plaintiffs' NEPA claim because of waivers issued under the Illegal Immigration and Immigrant Responsibility Act (IIRIRA) for the border barrier construction projects funded by DoD funds moved through the § 284 account. Irrespective of the Court's ruling on the impact of these waivers, Defendants have not purported to issue such waivers in relation to the border wall projects funded with MILCON moneys.

There is thus no basis for dismissing Plaintiffs' NEPA claim, which is not specific to either the § 2808 or § 284 moneys, but instead argues that CBP, as lead agency for the Trump administration's border wall projects, "shall supervise the preparation of an environmental impact statement," as more than one Federal agency "is involved in the same action," and the border wall projects involves a "group of actions directly related to each other because of their functional interdependence or geographical proximity." 40 C.F.R. § 1501.5(a)(1)-(2).

To the extent Defendants intend to argue that the "without regard to" language of § 2808 exempts compliance with NEPA and other environmental laws; even if true (which Plaintiffs do not concede), as discussed in section V, *supra*, such legal waiver would extend to only a small portion of the MILCON projects, since the large majority of those projects are indisputably not "military installations." Plaintiffs' NEPA claim remains justiciable.

CONCLUSION

For the foregoing reasons, which are supplemental to Plaintiffs' primary brief in opposition to Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendants' should be denied.

DATED: October 2, 2019

Respectfully Submitted,

/s/ Brian Segee

Brian Segee (CA Bar No. 200795)(Pro Hac Vice)
CENTER FOR BIOLOGICAL DIVERSITY
660 S. Figueroa St., Suite 1000
Los Angeles, CA 90017
Tel: (805) 750-8852
Email: bsegee@biologicaldiversity.org

/s/ Tanya Sanerib

Tanya Sanerib (D.C. Bar No. 473506)
CENTER FOR BIOLOGICAL DIVERSITY
2400 NW 80th Street, #146

Seattle, WA 98117
Tel: (206) 379-7363
Email: tsanerib@biologicaldiversity.org

Anchun Jean Su (D.C. Bar No. CA285167)
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street N.W., Suite 1300
Washington, D.C. 20005
Tel: (202) 849-8399
Email: jsu@biologicaldiversity.org

Jason C. Rylander (D.C. Bar No. 474995)
Michael P. Senatore (D.C. Bar No. 453116)
DEFENDERS OF WILDLIFE
1130 17th Street, NW
Washington, DC 20036
Tel: (202) 682-9400 x 145
Facsimile: (202) 682-1331
Email: jrylander@defenders.org
Email: msenatore@defenders.org

Anthony T. Eliseuson (IL Bar No. 6277427)
ANIMAL LEGAL DEFENSE FUND
150 South Wacker Drive, Suite 2400
Chicago, IL 60606
Tel: (707) 795-2533
Email: aeliseuson@aldf.org

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No.: 1:19-cv-00408

DECLARATION OF JILL M. HOLSLIN

I, Jill Marie Holslin, hereby declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge. If called as a witness, I could and would testify competently to these facts. As to those matters which reflect an opinion, they reflect my personal opinion and judgment on the matter.

2. I am a U.S. citizen and reside in Playas de Tijuana, Baja California Norte, in Mexico. I live in the lands adjacent to the U.S.-Mexico border.

3. I am and have been a member of the Center for Biological Diversity since 2017. I joined the Center because I share its goal of preserving, protecting, and restoring native species and the ecosystems upon which they depend. As a member of the Center, I receive its newsletters and electronic news updates. I rely upon the Center, in part, to represent my interests in protecting endangered and threatened species and their habitats.

4. I am a professor of Rhetoric and Writing Studies at San Diego State University. Because of the school's location, I cross the U.S.-Mexico border via car from Tijuana into San Diego at least twice each week. Because of my work, I drive on the lands adjacent to the border wall on both the U.S. and Mexico sides

whenever I cross the border to teach, and I plan to continue this commute at least twice each week.

5. Additionally, I am a professional photographer. Since 2009, the subject of my photography has been the vast wild landscapes of the borderlands, particularly in San Diego. The border wall itself has been a continuing theme in my photography, and my photography is a commentary on the way the wall has destroyed the environment. My work falls into a category of photography called New Topographics, which analyzes the destruction effects of human intervention on the landscape. I use my photography along with my own hiking, reading and research, as a mode of analyzing the effects of the border wall on the natural environment and the ecosystems of this area. I have a professional interest in documenting the wall's destructive effects on the environment. I regularly take pictures of the landscapes around the wall, ranging from every few days to every few weeks, and plan to continue to do so under this regular schedule.

6. Further, I enjoy a number of recreational activities in the borderlands, including hiking, walking and generally observing wildlife, wild lands and the expanse of the beautiful landscape. Some of my favorite areas within the borderlands include the Otay Mesa Wilderness in San Diego, which I frequently hike in order to observe the rich, biodiverse landscape there. I have seen the quino checkerspot butterfly and the rare Tecate Cypress. I also love walking along the beach in both San Diego and Tijuana near the border wall, where I can observe snowy plovers, the San Diego least tern, and other imperiled birds. I visit these favorite places on average twice a month and plan to continue to do so on average twice a month.

7. In addition, I derive great health benefits from recreating and photographing these wide open landscapes. I appreciate the ability to be

surrounded in wilderness, which sustains my psychological well-being and lowers my stress levels.

8. Because of the substantial interests I have for the habitats and species that exist in the borderlands, I am a fierce advocate in protecting them. In addition to being a member of the Center, I am also a member of the Sierra Club's Borderlands Campaign coalition and the Friends of Friendship Park, a bi-national park that sits on the border between Mexico and the United States. In my Sierra Club member capacity, I have spent nearly a decade and continue to spend ample time at the U.S.-Mexico border on both sides of the wall in San Diego and Tijuana to observe and monitor the impacts of the border wall and associated activities on wildlife migration and the surrounding wilderness areas and national forests, as well as prevent further degradation. In my capacity as a member of Friends of Friendship Park, I have spent and continue to spend ample time at the U.S.-Mexico border at Friendship Park to hold events and conduct activities that ensure the public's access to Friendship Park. Overall, I have dedicated my activism to protecting the wild lands and wildlife and encouraging a sense of community along the U.S.-Mexico border in San Diego County and Tijuana Municipality.

9. Since the 1980s, however, my professional, recreational, aesthetic, and spiritual and health interests derived from photographing and recreating in the borderlands have been harmed by border wall construction and associated activity. Prior to moving to Tijuana, I lived in San Diego for 23 years, from 1988-2011, and observed the direct detrimental impacts that the development of the border wall had on the borderlands.

10. Specifically, I have observed how border wall construction and activity associated with border wall additions, security, and maintenance have degraded the environment where I photograph and recreate. For example, in

Border Field State Park and the Tijuana River Estuary, the wall construction has severely altered the hydrology of the area, causing flooding events and reducing the ability of the canyon to act as a natural filter for contaminants and household waste water coming from the communities in Tijuana. This has created massive problems in the Tijuana River Estuary with contaminated water, raw sewage and the depositing of discarded car tires, old mattresses, and plastics. All of this waste degrades the area, and the border wall culvert has accelerated the flow of this trash into the protected areas. It is common now for the access road to be flooded with contaminated water for 6-7 months of the year. And the contamination in the estuary soil makes it hazardous to hike in the area.

11. As another example of the wall's adverse environmental impacts, in the area of San Diego Project 4, starting 3.6 miles east of the Otay Mesa Port of Entry extending east. The building of roads and clearing of a wide swath of land to allow for the wall's construction directly destroys the root system of trees and plants in the area. These root systems hold the soil in place, and prevent erosion and catastrophic flooding during heavy winter rains, and prevent the propagation of non-natives. As a result, non-native species have populated the lands along the border wall, and these species tend to disproportionately suck up water that native plants need to thrive, leading to the extermination of native species in the area. This is particularly egregious in San Diego Project 4, where the wall is being built on land that has, historically, never been disrupted by construction. It is well-documented that the propagation of non-native species has increased the risk and gravity of wildfires in San Diego County. Native vegetation types such as chaparral, coastal sage scrub and valley grassland habitats are well-adapted to the normal cycle of natural wildfires and will return to their native condition within a few years of a fire. The presence of weedy, non-native invasive plants creates an

abnormal situation that influences wildfires, increasing the frequency of these fires, which in turn are fueled by fast-growing non-native plants that are easier to ignite. Thus, the vicious cycle of wildfire followed by quick growth of non-native invasive species gradually weakens and chokes out native plant species and actually promotes the greater frequency and severity of wildfires. These fires threaten the natural habitat, but in addition, put the neighborhoods and families of southern California in grave danger. The risk of wildfire is a direct threat to my continued enjoyment and use of this natural environment.

12. I am deeply concerned by the failure of Department of Homeland Security ("DHS") and U.S. Customs and Border Patrol ("CBP") apparent intent not to comply with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). Because my interests have already been injured by past wall construction and activity, I know that my interests will further be injured by CBP's transfer of DoD emergency MILCON funds, and associated failure to comply with our environmental laws with respect to the 'San Diego 4' new border wall replacement.

13. In addition, the San Diego 4 border wall construction will injure my interests in the protection and conservation of the wildlife and ecosystem of the borderlands. The construction already has and will continue to alter the ecological landscape of the borderlands, displace and eliminate plant species, and detrimentally impact and restrict wildlife access and connectivity in those lands. The apparent failure and refusal of DHS and CBP to comply with NEPA and ESA means that the government is not properly analyzing and mitigating the consequences of the border wall construction on the wildlife and ecosystem in the borderlands area. These failures directly harm my interests in the preservation and

conservation of species and my chances of seeing these species, especially imperiled species like the quino checkerspot butterfly, in the future.

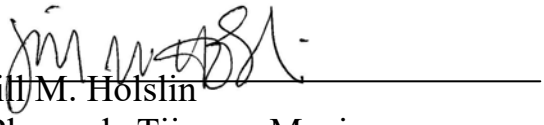
14. To the extent that the prototype construction and proposed border wall replacement construction are being done without compliance with federal laws, including but not limited to NEPA and the ESA, these agencies are violating my procedural rights and causing my procedural and information harms.

15. If DHS and CBP complied with NEPA, the ESA, and other federal laws, the government would make public information about the potential environmental harms of their actions and allow for public comment. Through these efforts, I would be able to suggest measures that would further avoid, minimize, and/or mitigate harms.

16. I am hopeful that NEPA and ESA analyses, if properly done by DHS and CBP, would result in additional protections for the area, mitigation measures to stop the environmental degradation and harm to species, and the potential halt of new construction in the borderlands area. Requiring DHS and CBP to prepare NEPA analyses and conduct ESA consultation will surely redress the procedural harms I have suffered.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of September, 2019,



Jill M. Holslin
Playas de Tijuana, Mexico